No. 3680

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit 5

WONG WONG,

Plaintiff, Plaintiff in Error,

vs.

HONOLULU SKATING RINK, LTD., MORRIS ROSENBLEDT and FRED HARRISON,

Defendants, Defendants in Error.

ORAL ARGUMENT OF EDWARD HOHFELD, IN BEHALF OF MORRIS ROSENBLEDT AND FRED HARRISON, DEFENDANTS IN ERROR.

(MAY 9, 1922)

No. 3680

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WONG WONG,
Plaintiff, Plaintiff in Error,

vs.

HONOLULU SKATING RINK, LTD., MORRIS ROSENBLEDT and FRED HARRISON,
Defendants, Defendants in Error.

ORAL ARGUMENT OF EDWARD HOHFELD, IN BEHALF OF MORRIS ROSENBLEDT AND FRED HARRISON, DEFENDANTS IN ERROR.

(MAY 9, 1922)

There are three main points which I desire to present to this court in support of the judgment of the Supreme Court of Hawaii:

First: That at the time the plaintiff commenced his action, that is, on December 16, 1914, there was nothing due him from the defendants, Rosenbledt and Harrison; it was on this ground that the Supreme Court of Hawaii based its decision.

Second: That under the Mechanic's Lien Law of Hawaii (Sec. 2867), liens may be foreclosed only after demand made upon the persons against whom the lien is sought to be asserted and the refusal of the amount due, or neglect to pay the same upon demand; admittedly no demand was, in fact, made upon either of the defendants Rosenbledt or Harrison, but only upon the defendant, Honolulu Skating Rink, the lessee of the property. The Supreme Court on the first appeal in the case (24 Haw. pp. 191-192) held that the demand upon the lessee, Skating Rink, constituted a demand, in legal contemplation, upon the lessors within the meaning of the statute. Subsequently, however, on the second appeal (25 Haw. pp. 350-351), a majority of the court considered that the court had committed error in so holding on the former appeal, but considered that, on the second appeal, they were bound by their former opinion, under the doctrine of the "law of the case." The defendants in error contend that the Supreme Court was correct in its view on the second appeal, and that in fact, and in law, there was no demand made upon either of the defendants in error.

Third: Under the terms of Section 2863 of the Mechanic's Lien Law of Hawaii, it is provided that any person furnishing labor or material to be used in the construction or repair of a building shall have a lien for the agreed price upon the building as well as upon the interest of the *owner of such*

building in the land upon which the same is situated. The defendants in error, as *owners of the land,* leased their property to the Skating Rink Company, and granted the Skating Rink Company permission to erect a skating rink on the property at the sole cost and expense of the lessee, and not at all at the expense of the lessors; it being provided that at the expiration of the term of the lease the property should then become the property of the lessors. In this case, the Supreme Court on the first appeal (24 Haw. 181) held that, under this statute, the interest of the lessors was answerable to lien claimants; the court following in this regard the companion lien case of Lewers & Cooke, the materialman, v. Wong Wong, the original contractor (22 Haw. 765). Although the Supreme Court correctly held that there must be a contract between the owner of the land and the materialman or original contractor, and that although, in the case at bar, the lessors' contract was with the lessee, and not with the original contractor, yet since the lessee contracted with the builder, who in turn contracted with the materialman, the requirement that there must have existed the contractual relation was therefore fully met.

The defendants in error contend that the Supreme Court, in so holding, committed error, and that in order to charge a lessor's estate with the expense of repairs or improvements made by a lessee, there must be affirmative evidence that he agreed to pay

for the improvements, or impliedly consented that his estate should be bound, or that the statute, by its express terms, made the lessor's estate liable under the terms and conditions prescribed by such statute.

In order better to understand the significance of these three points, a brief statement of the facts of the case out of which these points arise should be made.

In the year 1914 the defendants, Rosenbledt and Harrison, owned certain real property in Honolulu which they leased to the corporation, the Honolulu Skating Rink, which is also a defendant in this action, though not a defendant in error, since the Honolulu Skating Rink defaulted, and judgment passed against it in favor of plaintiff as prayed for in his complaint.

Rosenbledt and Harrison leased this real property to the Honolulu Skating Rink, the lessee having a right by the terms of the lease to construct a skating rink thereon at the lessee's sole cost and expense, it being provided that at the expiration of the term, this building should revert to the lessors.

The lessee therefore made a contract with the plaintiff Wong Wong, for the construction of this skating rink, and the building was in fact constructed pursuant to this contract. The only parties to this contract were the lessee (Honolulu Skating Rink) and Wong Wong, the original contractor.

The building contract provided that payments for the building were to be made as follows:

$2000.00 upon the completion and acceptance of the building;

$2500.00 thirty days after the date of completion and acceptance; and the balance of

$1963.60 forty-three days after the date of completion and acceptance of the building.

Total $6463.60.

There was also due upon the completion and acceptance of the building five hundred fifty dollars ($550) for extras, so that upon the completion and acceptance of the building there was due twenty-five hundred fifty dollars ($2550), and thirty (30) days thereafter twenty-five hundred dollars ($2500) more, or a total of five thousand fifty dollars ($5050); the balance of nineteen hundred sixty-three and 60/100 dollars ($1963.60) not being due and payable until forty-three (43) days after the date of the completion and acceptance of the building.

The evidence showed that the building was *completed* on November 2, 1914. Plaintiff contended that the building was also accepted on that date. Defendants, however, contended that the evidence showed without conflict, and the trial court on the last trial so found, and the Supreme Court so held, that the building was in fact *accepted* November 4,

1914. Therefore, the final payment on the contract, to-wit: nineteen hundred sixty-three and 60/100 dollars ($1963.60) was not due until December 17, 1914; since the suit was commenced December 16, 1914, this amount could not be covered by the suit, and both the trial and supreme courts so held. Therefore, the first two payments only, to-wit: twenty-five hundred fifty dollars ($2550), plus twenty-five hundred dollars ($2500), totaling five thousand fifty dollars ($5050) could be embraced within the terms of the suit.

The undisputed evidence showed that the skating rink had previously paid to plaintiff before suit, the sum of twenty-four hundred seventy dollars ($2470), and it was so stated in the notice of lien which was filed, thus leaving a balance of twenty-five hundred eighty dollars ($2580); but the undisputed evidence also showed that Wong Wong, the plaintiff, was at the time of the commencement of his suit against the defendants indebted to Lewers & Cooke, a materialman, in the sum of twenty-five hundred eighty-six and 61/100 dollars ($2586.61), or six and 61/100 dollars ($6.61) more than the amount of twenty-five hundred eighty dollars ($2580), the balance due to plaintiff from this skating rink. Furthermore, a lien had been filed and suit commenced by Lewers & Cooke, the materialman, against the defendants' property to foreclose this lien for said amount of twenty-five hundred eighty-six and 61/100 dollars ($2586.61).

The building contract provided:

> "That before such payment is required, the contractor shall given the architect good and sufficient evidence that the premises are free from all liens and claims chargeable to the said contractor, and further, that if at any time there shall be any lien or claim for which, if established, the owner of the premises might be made liable, and which would be chargeable to the said contractor, the owner shall have the *right to retain out of any payment then due, or thereafter to become due,* an amount sufficient to completely indemnify him against such claim or lien until the same shall be effectually satisfied, discharged or cancelled."

The Supreme Court of Hawaii, in its opinion, held that at the time of the demand on the defendants and the commencement of the suit, nothing was due said plaintiff (25 Haw. pp. 355-356):

> "Upon completion and acceptance of the building the Skating Rink Company paid $2470 and on December 11 Lewers & Cooke, Limited, filed a notice of lien for materials furnished the contractor in the sum of $2586.61. The plaintiff admits the payment of the $2470 and the defendants claim they had the right under the terms of the contract and the provision of the statute to withhold, from the amount otherwise due, the amount of the Lewers & Cooke claim. If defendants were justified in withholding the amount of the Lewers & Cooke claim it is clear that there was nothing due the plaintiff on December 15 when he made his demand and nothing due on December 16 when his suit was filed.
>
> The provision of the contract relied upon by the defendants is plain and unambiguous and authorizes the *owner* to retain out of any pay-

ment then due or thereafter to become due an amount sufficient to indemnify him against such claim or lien 'until the same shall be effectually satisfied, discharged or cancelled.' At the time plaintiff made the demand and filed his suit the claim of Lewers & Cooke, Limited, was on file and a suit pending to enforce it, and had not been 'satisfied, discharged or cancelled.' We think, therefore, that the defendants were authorized to retain such amount as would indemnify them against the claim if it were ultimately established. The claim of Lewers & Cooke, Limited, was sufficiently large to take up the unpaid balance of the first installment and extras and the second installment. *The final payment under the contract was not then due.* There was nothing due which the plaintiff was authorized to demand payment of and nothing due when the suit was filed."

The case, after this decision by the Supreme Court of Hawaii, was sent back to the trial court, and the trial court, consistent with the decision of the Supreme Court, found that on December 15, 1914, when plaintiff made his demand, and on December 16, 1914, when plaintiff filed his suit, nothing was due plaintiff, and the court ordered the judgment theretofore entered by Judge Edings on September 4, 1918 (see Trans. p. 18) set aside so far as it affected the defendants, Rosenbledt and Harrison, though the judgment was allowed to stand as to the defendant, Skating Rink. Subsequently, this judgment dismissing the action as to the defendants, Rosenbledt and Harrison, was affirmed by the Supreme Court February 18, 1921 (25 Haw. 739), and

it is to this last judgment of the Supreme Court that the present writ of error is directed.

The answer which the plaintiff in error makes in his brief to this holding of the trial court and of the Supreme Court is that the building was completed *and accepted* November 2, and not on November 4, 1914, and he makes the following points in support of this position:

First: That the default of the Skating Rink to the complaint in which it was alleged that the building was completed and accepted on November 2, 1914, is an admission and establishes the fact both against the Skating Rink and against these defendants in spite of the fact that the defendants denied that the building was accepted before November 4, 1914.

To hold that the defendants, Rosenbledt and Harrison, are bound by the default of the Skating Rink would practically mean that these defendants were not necessary parties to the action at all, and that the proceeding was one in rem against the property, and that the judgment was governed solely by the action taken, or the default suffered, by the Skating Rink.

The second point that plaintiff in error makes to the effect that the building was accepted on November 2, 1914, is that the Supreme Court decided in the first appeal that the building was completed on that day, and that this became the "law of the case." There are several answers to this conten-

tion. In the first place, this particular point was not considered or argued before the Supreme Court on the first appeal. The only points decided by the Supreme Court were that the two grounds of nonsuit upon which the lower court had granted the motion were not well taken, and held that the notice of lien was sufficient, and that demand by the lien claimant upon the skating rink was in law also a demand upon the defendants, Rosenbledt and Harrison.

In the second place, the "law of the case" has no application to this point whatsoever, and for the following reasons:

(1) The "law of the case" is only applicable to issues of law and not to issues of fact.

Allen v. Bryant, 155 Cal. 257,

in which the court held:

> "The doctrine of the law of the case presupposes error in the enunciation of a *principle of law* applicable to the facts of a case under review by an appellate court, and its extension is not looked upon with favor. The doctrine is rarely and in a very limited class of cases applied to matters of evidence, as distinguished from rulings at law."

(2) The "law of the case" applies only to rulings upon questions of law which were actually presented and considered upon a former appeal.

Trower v. City and County of San Francisco, 157 Cal. 762.

In this case the court held:

> "The doctrine of the 'law of the case' is limited to rulings upon questions of law which were actually presented and considered upon a former apeal."

(3) And lastly, and entirely decisive of the question, the "law of the case" is not applicable and cannot be applied in the present case from any point of view so as to be binding upon this court, as the court of last resort, in the case at bar. This point has apparently been entirely overlooked by the plaintiff in error.

By the great weight of authority, the doctrine of the "law of the case" applies only in any event to *appellate courts of last resort* in the particular case and not to intermediate appellate courts. Thus in

Lawrence v. Ballou, 37 Cal. 518,

the court said, at page 521:

> "The doctrine that a previous ruling has become the law of the case has no application except as to the decisions of appellate courts. When the *court of last resort* has finally ruled upon the point, and the case has been returned to the court below, the principle invoked by respondent applies, and the decision of the appellate court, right or wrong, has become the law of the case in all subsequent proceedings, for the obvious reason that, otherwise, the end of the case might never be reached. But if, at the trial of a cause at nisi prius, the court makes a ruling upon a certain point, the court is not bound by it, if the same point arises again. On the contrary, the court may, and should change its ruling, if, in the meantime it has become satisfied that it was erroneous.

> Nor, if the Court adheres to its ruling, is the party against whom the ruling is given precluded from taking an exception because he acquiesced in the ruling when it was first made."

To the same effect is

Klauber v. San Diego, etc. Company,
98 Cal. 105,

where the court said at page 107:

> "The 'law of the case' is a phrase which has been formulated in this state to give expression to the rule the final judgment of the *highest court* upon a question of law arising between the parties to an action on a given state of facts, establishes the rights of the parties to that controversy, and is a final determination thereof, and like a final judgment in any other case, estops the parties thereto from afterwards questioning its correctness."

In

Jungk v. Reed (1895), 42 Pac. (Utah) 292,

the point was presented to the Supreme Court of the Territory of Utah, to which a writ of error then lay from the Supreme Court of the United States. The court, in denying the applicability of the doctrine of the "law of the case" to its decisions where an amount of five thousand dollars was involved, and when in consequence a writ of error lay to it from the Supreme Court of the United States, said at page 295:

> "There is another reason why the former decision of this court did not become the law of the case, and that is that this court in this

case is not the *court of last resort.* As to this case, involving as it does, a sum in excess of $5,000, the Supreme Court of the United States is the court of last resort, and this stands as an intermediate court. The doctrine of the law of the case is not only restricted to appellate tribunals, but also to *courts of last resort.* See U. S. v. Elliott (Utah), 41 Pac. 720; 1 Herm. Estop., 117, 118; Lawrence v. Ballou, 37 Cal. 518. This is well illustrated by the case of Galigher v. Jones, 129 U. S. 193; 9 Sup. Ct. 335. That was a case involving the consideration of the duty a broker owes to his principal when he refuses to obey telegraphic instructions from his principal. On the first appeal of that case to the supreme court of Utah territory, it was decided that the broker was not required to signify his refusal by a telegram, but could do so in the ordinary course of mail. The trial court having held otherwise, the case was reversed, with instructions to grant a new trial. The second trial was had before a referee, who found as a fact that the supreme court of the territory had held, under the same facts, and as matter of law, that the broker was excused if he signified his refusal by mail, and, basing his decision on this as the law in the case, found in favor of the broker. That finding was adopted by the trial court, and affirmed by the supreme court of this territory. On appeal to the supreme court of the United States, however, after reciting the finding, and the found fact that the finding was in accordance with the law of the case as established on the first appeal, and after quoting from the decision of this court on the first appeal, the supreme court of the United States say that the court was in error, that the broker was but an agent, and was bound to follow the directions of his principal, or give notice that he declined to continue the agency, and where the direction came

by telegraph, his notice must be by a like prompt means of communication, and reversed the case. Of course, that court could only reverse the case if the supreme court of Utah territory on the second appeal committed an error in affirming it. Appeals lie to the supreme court of the United States from final judgments of the supreme court of this territory to correct the errors of this court. If no error has been committed, the case will not be reversed. If this court, on the second appeal, in Galigher v. Jones, was, as matter of law, required to apply the doctrine of the law of the case, it could have committed no error in so applying it, and there could have been no occasion to reverse the action. On principle it would seem that, admitting that the law was erroneously declared on a former appeal of an action, and that such cause could be carried to the supreme court of the United States on appeal from the action of this court, there could be no reason in requiring a party to go to that court in order to correct that error; and in this we can see the reason why the law of the case has not been applied to intermediate, but only to courts of last resort."

The case of

Galigher v. Jones, 129 U. S. 193; s. c. 32 Law Ed. 658,

which is referred to in the preceding case of *Jungk v. Reed,* supra, is, by analogy, a direct determination by the Supreme Court of the United States that the circuit court of appeals in the present case is not bound by any doctrine of the "law of the case" by reason of any proceedings which have taken place in the territorial courts of Hawaii.

The Supreme Court of Hawaii, contrary to the Supreme Court of the Territory of Utah, considered itself bound by the "law of the case" so far as its previous rulings on questions of law in this case were concerned, although on a subsequent appeal, a majority of the court thought that it had committed error on the first appeal. See 25 Haw. at pages 350-351, where the court said:

> "The other members of the court, while agreeing with the conclusion that the former opinion of this court to the effect that a demand upon the Skating Rink Company constituted a demand upon Rosenbledt and Harrison is now the law of the case and not open to inquiry, desire to express their doubt as to the correctness of that holding. The writer does not desire to join in that expression but is content with the holding that we are bound by the former opinion."

It is unfortunate that the Supreme Court of Hawaii did consider itself bound by the doctrine of the "law of the case" since on the second appeal, two, at least, of the three Justices were of the opinion that the court on the first appeal had erred in holding that a demand on the Skating Rink for payment of the moneys due was, in legal contemplation, a demand on the defendant owners on the theory that the Skating Rink, lessee, was "the agent" for the lessor owners; since, under the Hawaiian Mechanic's Lien Statute, a demand was necessary on the lessors as a condition precedent to suit, if the Supreme Court had not fallen into the error of deeming itself bound "by the law of the

case'' on the previous appeal, the Supreme Court would have decided the case in favor of the defendants, not only on the ground that nothing was due at the time of the commencement of suit, but also on the ground that no demand in fact or in legal contemplation, had been made upon the defendants.

Of course, this error of the Supreme Court of Hawaii was immaterial in view of the fact that the Supreme Court held in favor of the defendants upon the other valid ground that no moneys were in fact due at the time of the commencement of the suit. And this error of the Supreme Court is material now only in the event of the remote possibility that this court should deem the ground relied on by the Supreme Court of Hawaii as the basis of its decision to be erroneous, in which event it would be absolutely necessary for this court to pass upon the question as to whether or not a demand was, in legal contemplation, made upon the lessors by reason of the fact alone that a demand was made upon the lessee.

To the effect that a demand is necessary as a condition precedent to suit, see

> *Lewers & Cooke, Ltd. v. Fernandez*, 23 Haw. 744 (brief of defendants in error, pp. 34-35).

So much for the ''law of the case,'' to the establishment of which over one-half of the brief of the plaintiff in error is devoted. It has been seen from the cases cited above that this court, as an appellate court of last resort, is entirely free to consider

every question of law in the record, untrammeled by any previous decision of the Supreme Court of Hawaii, and is free to decide the same as it deems correct.

The plaintiff in error furthermore makes the point in his brief (page 23) that there was sufficient evidence for the Presiding Justice to make his findings that there was an acceptance by the architect on November 2, 1914. Even assuming, for the sake of argument purely, that this were true, since there was also sufficient evidence for the Justice to make his findings that there was an acceptance by the architect on November 4, 1914, the findings of the lower court would be controlling. But in truth and in fact, there was absolutely no evidence introduced by the plaintiff in error to show that there was an acceptance of the building on November 4. The quotation in the testimony of the architect, on page 24 of plaintiff's brief, as follows:

> "The architect testified: 'Q. And was this building completed to your satisfaction as an architect?
> A. It was.' ",

is not testimony to the effect that the building was *accepted* on the date of its completion. This question was left open to be established by further evidence, and is established by the date (November 4) of the written certificate of acceptance of the architect. On this point the Supreme Court of Hawaii said (see 25 Haw., p. 355):

> "The architect's written acceptance of the building is in evidence and bears date Novem-

> ber 4, 1914. No other evidence bearing on the acceptance of the building was offered, but it appears from the evidence that the building was completed November 2."

In *Jones on Evidence,* Section 51, it is said:

> "There is always a presumption that instruments were made on the day they bear date, or in the code language, that writings are truly dated * * * It is doubtless true that in the great majority of cases, the date of the instrument and the time of its execution are the same, hence the inference may fairly be drawn until the contrary is proved."

Counsel for plaintiff in error says that because the evidence shows the building was *completed* on November 2, the court should draw the inference that it was also *accepted* on that date. But why should the court draw such an inference? It is not a necessary inference. As a matter of common experience, we know that a building is often, if not usually, accepted several days after the date of its completion. Furthermore, an inference is of less weight as a matter of evidence than the presumption that the written acceptance was truly dated. Thus, in *Jones on Evidence,* Section 9 (a), it is said:

> "The difference between an inference and a presumption is that a presumption is a mandatory deduction, while an inference is a permissible deduction, which the reason of the jury makes without an express direction of law to that effect."

In reply to the point on page 18 of the brief of plaintiff in error that,

THE ASSIGNMENT FOR SECURITY DOES NOT DEFEAT THE ENFORCEMENT OF THE LIEN,

it is stated in plaintiff's opening brief, page 2,

> "Lewers & Cooke, Limited, furnished the plaintiff in error with material for the construction of the building, advanced money to pay for labor, and to secure themselves had him make an assignment of payments to them in order to have the payments made through their office."

It is evident that if the original contractor assigned to Lewers & Cooke, a materialman, all payments due and to grow due under the plaintiff's contract with the Skating Rink, that Lewers & Cooke, themselves, would have had a right to bring an action against the Skating Rink, and also against the defendants, Rosenbledt and Harrison. The plaintiff, Wong Wong, the assignor, would not have been even a necessary or proper party to such action. It is so decided in

Allen & Robinson v. Redward, 10 Haw., at page 157,

where the court said:

> "The assignment by the contractor to the plaintiff (a matrialman), of all moneys payable under the contract was accepted by the Hawaiian lodge (the owner). * * * This did not estop the plaintiff from filing a lien. It did not make him a party to the contract. The contract itself was not assigned, but only the moneys payable under it, and no doubt the plaintiff could not recover on this assignment any moneys beyond what would otherwise have been payable to the contractor. But the present claim is not for the moneys payable by the

terms of the contract; it is for the enforcement of a lien under the statute."

It may be conceded, for the sake of argument, that the plaintiff, Wong Wong, the assignor, might have an equity remaining in the contract for the payment of moneys under his contract on the theory that Lewers & Cooke, Limited, had been paid the moneys due them from the plaintiff, to secure the payment of which Wong Wong had made an assignment of the moneys due under his contract. In such case, however, in order to avoid the application of the doctrine of "splitting a cause of action," Lewers & Cooke, Limited, as the assignee, would be a necessary party to any action by Wong Wong to enforce payment from his obligors.

It is so decided in one of the cases cited on page 18 of the brief of plaintiff in error, namely:

Davis v. Crookston Water Works, etc. Company; And Thompson, Intervener.

In this case Davis, the contractor, had made an assignment of moneys due him from the owner, Crookston Water Works, etc. Company, to Thompson, as collateral security to secure the payment of money advanced by Thompson to plaintiff to enable him to carry on the work. The court said:

"This left sufficient interest in the plaintiff to enable him to file the lien in his own name and the benefit of it would inure to Thompson. On the same principle, plaintiff had sufficient interest in this controversy to commence this foreclosure suit in his own name. *Thompson was a necessary party to it, and plaintiff's*

failure to make Thompson a party was cured by Thompson's own intervention," etc.

We come now to the second point, to-wit:

That under the Mechanic's Lien Law of Hawaii (Sec. 2867), liens may be foreclosed only after demand made upon the persons against whom the lien is sought to be asserted and the refusal of the amount due, or neglect to pay the same upon demand.

Section 2867 of Chapter 162 of the Revised Laws of Hawaii, provides:

> "The liens hereby provided may, after *demand and refusal* of the amount due, or upon neglect to pay the same *upon demand,* be enforced by proceedings in any court of competent jurisdiction," etc.

We have already seen that the Supreme Court of Hawaii held in the case of

> *Lewers & Cooke, Ltd. v. Fernandez,* 23 Haw. 744,

that a demand by the lien claimant upon the person from whom payment is sought is an absolute prerequisite and a condition precedent to the commencement of suit. But the question came up before the Supreme Court for the first time in the instant case whether a demand made upon the lessee would in law constitute a demand upon the lessors. On the first appeal (24 Haw., at page 191) the court held that a demand upon the lessee was, in law, a demand upon the lessors, the court saying:

> "It is urged on the part of the defendants Rosenbledt and Harrison that as no demand

was made upon said defendants after the filing of the notice of lien and before the commencement of this action that their property cannot be bound for lien claimed by plaintiff. We have held that the statute requires demand on the owner after the notice of lien is filed and prior to commencing action for its enforcement (Lewers & Cooke v. Fernandez, 23 Haw. 744; Lewers & Cooke v. Wong Wong, 24 Haw. 39). The evidence shows that demand was made by the plaintiff upon the corporation defendant but not upon the defendants Rosenbledt and Harrison after the notice of lien was filed and before this action was commenced. The defendants having engaged in a joint and mutual enterprise, their interests being correlated, we think that they should be regarded in the light of joint obligors, not so far as personal liability is concerned, but so far as their interest in the property involved is affected by plaintiff's lien. It has been held that one joint obligor is the agent for his co-obligors and may bind his co-obligors by a new promise on the joint obligation. Macaulay v. Schurmann, 22 Haw. 140. By analogy the same rule should apply here owing to the mutuality of the interest in the building upon which the lien is claimed by plaintiff. But irrespective of that view the defendants Rosenbledt and Harrison are bound by the demand made upon the defendant corporation owing to the limited relation of principal and agency which existed between them as herein shown. In Lewers & Cooke v. Wong Wong, 22 Haw. 765, we held that the corporation defendant here was the agent of the defendants Rosenbledt and Harrison for the erection of the building for which the lien is here claimed. The relation of principal and agent, limited as it was, presents the question whether demand upon the corporation defendant was sufficient demand upon the other defendants. We think that it was and so hold."

It is extremely difficult to see how the lessors who never were parties to the building contract, which was entered into between the lessee and the contractor, could be considered joint obligors on said contract. And the Supreme Court on the second appeal of this case repudiated their decision as being incorrect, and adhered to their prior decision only because of their erroneous belief that they were bound by the so-called doctrine of the "law of the case" (see 25 Haw., 347, at pages 350-351), quoted above at page 12.

If this court shall conclude that a demand in fact upon the defendants Rosenbledt and Harrison was necessary under the statute and decisions of the Supreme Court of Hawaii, then it being undisputed that no demand was in fact made upon them, the judgment should be affirmed on this ground alone. Indeed the complaint would fail to state facts sufficient to constitute a cause of action against the defendants for the reason that the complaint fails to allege that the plaintiff made any demand upon the defendants Rosenbledt and Harrison for the amount of the lien between the time that the lien was filed and the date within which the action was instituted.

This point has been fully developed in the brief filed for the defendants in error, on pages 34-42, and no further argument will be made herein in support of said point.

We now come to the third point, to-wit:

Under the terms of Section 2863 of the Mechanic's Lien Law of Hawaii, it is provided that any person furnishing labor or material to be used in the construction or repair of a building shall have a lien for the agreed price upon the building as well as upon the interest of the owner of such building in the land upon which the same is situated.

In

Lewers & Cooke, Ltd. v. Wong Wong, 22 Haw. 765,

the court held by a *divided vote of two to one* that a lessor was an owner of the building within the meaning of the statute, although he had no contractual or other relations with the contractor.

In

Allen & Robinson, Ltd. v. Reist, 16 Haw., at page 23,

the Supreme Court of Hawaii in construing this Mechanic's Lien Statute, said:

> "Although a mechanic's or materialman's lien is a creature of statute and not of contract, yet it is dependent upon and does not exist in the absence of contract. * * * It is necessary to allege the contractual relation. Otherwise the complaint would not show facts upon which a lien could be founded." etc.

The dissenting opinion of Mr. Justice Watson in the case of

Lewers & Cooke, Ltd. v. Wong Wong, supra,

represents, in our opinion, the correct reasoning and principle of law.

Mr. Justice Watson said:

> "I am unable to agree with the majority in their holding that the plaintiff in this case is entitled to a lien upon the interest of the lessors in the land upon which the building was erected. As I read the foregoing opinion, the majority arrived at the conclusion that the lessors' interest is subject to the lien on the theory that the tenant, by reason of the covenant in the lease requiring him to erect a building on the leased premises, thereby became the agent of the owners to cause the improvement to be placed upon the land. But to my mind the better reasoned authorities do not in the absence of a statute support this theory of agency."

Here Mr. Justice Watson cites and refers to some of the leading cases holding that the lessors' interest is not subject to the lien under the facts of the principal case. Among the cases cited is,

Morrow v. Merritt, 16 Utah 412,

where the court said:

> "It does not appear that Calder (the lessor) authorized Merritt (the lessee) to make the improvements at his expense or to furnish the materials or to perform the labor for him. The relation of principal and agent did not exist between them."

Mr. Justice Watson called this Utah case as one "on all fours" with the one at bar.

To hold, as the majority of the Hawaiian court did, in the *Lewers & Cook* case, supra, that because of the covenant in the lease requiring the lessee to erect a building on the lessors' land, the lessee thereby became the lessors' agent to make a contract

with the contractor is, we respectfully submit, to arbitrarily lay down a proposition of law which cannot be supported by any legal principle.

There is no contract which creates any indebtedness against the lessors. In Hawaii there is no statute, nor is there any principle which can be called into requisition which makes the lessee the agent of the lessors.

In

20 American & English Enc. of Law, at page 317,

it is said:

> "While the lessee is regarded as an owner in so far as he may subject his leasehold estate to mechanic's liens for improvements upon the estate, he cannot, as a general rule, impose any charge upon the reversion or estate of the lessor therefor, and the fact that the lessor acquiesces in the improvements by the lessee does not subject his reversion to the mechanic's lien therefor. * * * The lessee contracting for improvements upon the demised premises does not, merely by virtue of his relation as lessee, contract as agent of the lessor, so as to subject the property to mechanic's liens therefor. Under a provision in the lease expressly requiring the lessee to make specified improvements or repairs, the lessee in so doing has been held not to act as the agent of the lessor so as to subject the reversion of the lessor to mechanic's liens therefor."

In the brief of the defendants in error, which has been filed, there are a great many authorities cited from the different jurisdictions of the United

States, as well as from England, which support the proposition of the defendants in error to the effect that under a statute, such as exists in Hawaii, the lessors' interest in the land would not be subject to a mechanic's lien. The few minutes left me for oral argument will permit me merely to call attention to a few of the authorities on the question.

So too, in *Jones on Liens,* Section 1280 (see brief of defendants in error, pp. 29-30).

Two New York cases are cited in the brief, the facts and holdings of which are peculiarly apposite to the case at bar. These are,

Knapp v. Brown, 45 N. Y. 211 (brief pp. 22-23),

and

Muldoon v. Pitt, 54 N. Y. 269 (brief pp. 23-24).

ALTHOUGH THE QUESTIONS ARISING UNDER THE MECHANIC'S LIEN STATUTE OF HAWAII INVOLVE THE INTERPRETATION OF A LOCAL STATUTE OF THE TERRITORY, NEVERTHELESS THIS COURT IS FREE TO PUT ITS OWN INTERPRETATION UPON SUCH STATUTE.

Counsel for plaintiff in error has made the point in his oral argument and in his reply brief filed herein that this court should not review the decision of the Supreme Court of Hawaii in so far as the construction of the Mechanic's Lien statutes are concerned, to the effect that the interest of the lessors in the land is subject to the plaintiff's

lien, and to the effect that a demand upon the lessee was in legal contemplation a demand upon the lessors.

The rule invoked by the plaintiff in error has no application to the present case for the following reasons:

In the first place, even the rule that a construction by the highest state court of a state statute is binding upon the federal courts is subject to the well established exception that the rule is not applicable with regard to the decisions of the state court on the construction of a statute rendered after the cause of action has arisen and after the making of the contract on which the cause of action is based. In such a case, the federal court will exercise its independent judgment concerning the interpretation of the state statute.

Great Southern Hotel Company v. Jones, 193 U. S. 532, 548;

Kobey v. Hoffman, (1916) 229 Fed. 486, 488 (C. C. A. 8th Cir.);

College v. Wabash, etc. Railroad Company, (1909) 171 Fed. 805 (C. C. A. 6th Cir.).

If such exception obtains in the case of the construction of a state statute by the Supreme Court of a state *a fortiori* would such an exception obtain where a territorial statute has been construed by the highest court of the territory.

Admittedly in the case at bar, the construction of these mechanic's lien statutes holding that the

lessors' interest is liable to a lien, and that demand upon the lessee constitutes a demand upon the lessors, was made for the first time in connection with the two cases of *Lewers & Cooke, Ltd. v. Wong Wong, et al.,* and in the case at bar of *Wong Wong v. Honolulu Skating Rink, et al.* Of course, the cause of action and the contract out of which the same arose existed necessarily before these decisions of the Territorial Court. Therefore, the exception noted above obtains in the present case.

Furthermore, even if this decision by the Supreme Court of the Territory had antedated the cause of action in the present case, nevertheless a federal court has authority to pass upon the correctness of the interpretation of a territorial statute by the highest court of the territory.

Thus in,

> *Northern Pacific Railroad Company v. Hambly,* 154 U. S. 349,

Mr. Justice Brown said, in construing a statute of the territory of Dakota:

> "While this construction, given by a Supreme Court of a territory, *is not obligatory* upon this court, it is certainly entitled to respectful consideration, and in a doubtful case might be accepted as turning the scale in favor of the doctrine there announced."

Plaintiff in error in his oral argument and in his reply brief cites the case of

> *Arctic Lumber Company v. Borden,* 211 Fed. 50 (1914 C. C. A. 9th Cir.).

This case involved the construction of a mechanic's lien statute of the territory of Alaska; said mechanic's lien law having been adopted from the lien law of Oregon. The mechanic's lien law of Alaska provides that one who furnishes material in the construction of a building "at the expense of the owner" shall have a lien. It is further provided that every building constructed on any lands with the knowledge of the owner "shall be held to have been constructed at the instance of such owner," and that the owner's interest shall be subject to any lien filed in accordance with the provisions of the code, unless he shall within three days after he shall have obtained knowledge of the construction, give notice that he will not be responsible for the same, by posting a notice in writing to that effect in some conspicuous place upon the land or in the building.

The decision of the Circuit Court of Appeals for the Ninth Circuit was undoubtedly correct in holding, under the facts of that case and under the terms of the mechanic's lien statute of Alaska, that the lessor's interest was liable to the lien. The court also found in said case that the labor and materials were furnished at the owner's instance, or at the instance of his agent. This case, therefore, has no application whatsoever to the facts in the case at bar, nor to the particular mechanic's lien statute of the Territory of Hawaii.